United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1601

ORIGINAL

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To be argued by
MAX COHEN

In The

United States Court of Appeals

For The Second Circuit

P/S

JACOB SUISSA,

Plaintiff-Appellant,

vs.

AMERICAN EXPORT LINES, INC., (f/k/a AMERICAN EXPORT ISBRANDTSEN LINES, INC.,),

Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the Southern District of New York.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
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MAX COHEN
Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JACOB SUISSA,

Plaintiff-Appellant,

-against-

AMERICAN EXPORT LINES, INC., (f/k/a AMERICAN EXPORT ISBRANDTSEN LINES, INC.),

Defendant-Appellee.

----------x

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal by plaintiff from the judgment of dismissal entered in the office of the Clerk of the United States District Court for the Southern District of New York on December 26, 1973 pursuant to a decision dated December 14, 1973 by the Hon. Robert J. Ward (Suissa v. American Export Lines, Inc., 367 F. Supp. 1113) granting summary judgment in favor of defendant.

STATEMENT OF THE CASE

This was an action originally instituted by plaintiff in the Civil Court of the City of New York, New York County (Index No. 38956/73) on March 22, 1973 to recover

overtime wages in the sum of $3,384.82 arising out of his employment as an electrician abroad defendant's vessel, the SS "EXFORD" from October 3, 1972 to February 11, 1973. The indorsed complaint also sought statutory penalties pursuant to 46 USC 596 as a result of defendant's wrongful refusal or neglect to pay said wages. Following service of the summons, the defendant removed the action to the District Court on April 20, 1973 by basing jurisdiction upon Section 301 of the Labor Management Relations Act of 1947 (29 USC 185). On April 25, 1973 a motion was made to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure:

> "...on the ground that plaintiff has failed to state a claim upon which relief can be granted in that a final and binding settlement of plaintiff's claim for overtime has been made..."
>
> ("1", Motion to dismiss complaint)

An alternative branch of the motion sought to compel plaintiff to exhaust his "administrative remedies" under the union agreement.

No answer was ever interposed by defendant in

connection with plaintiff's complaint.

In support of its motion, the defendant shipowner annexed an affidavit by Mr. Albert G. Fialcowitz, its Director of Labor Relations. Said deponent based his assertions upon information allegedly obtained from (a) the chief engineer of the vessel, a Mr. Eisner; (b) NMU Patrolman, Mr. LaForgia; (c) defendant's local representative and payroll master, Mr. Nehrbauer; (d) NMU Vice President Baresic; and (e) defendant's manager of operations, Captain Shivers. No affidavits or statements were ever furnished by defendant from any of these individuals. The plaintiff's opposing affidavit fully sets forth the facts and circumstances in connection with his employment by defendant; his claim for overtime; and the negotiations he had with and by union representatives. Mr. Suissa stated that there had been no settlement of his overtime claim; and moreover, his union had acknowledged that he could independently pursue the matter.

At the time of the argument of the motion, plaintiff's counsel had pointed out that the moving papers

were inadequate to support any motion for summary judgment; and that in any event the Court did not have jurisdiction over the matter since the original claim in the Civil Court had not been predicated upon the Labor Management Relations Act. Nevertheless, the Court granted the motion to dismiss but without prejudice to filing an amended complaint stating a claim under 29 USC 185 (Suissa, supra, p. 1115).

ARGUMENT

POINT I

THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BOTH PROCEDURALLY AND ON THE MERITS.

The Court recognized in its opinion that "since the motion was supported and opposed with affidavits, it is treated as one for summary judgment pursuant to Rule 56" (Suissa, supra, p. 1114). However, an examination of Rule 56(e) shows unequivocal language requiring affidavits to be made on personal knowledge with evidentiary facts.

Despite this clearcut requirement, the supporting affidavit by Mr. Fialcowitz was not made on personal

knowledge and did not contain any facts which would be admissible in evidence. At no time was any request made by movant for leave to file supplemental affidavits nor did it offer any explanation for these glaring omissions. Not only was the motion patently defective in this regard, but it also failed to follow the requirements of the Southern District as shown in its General Rule 9(g):

> "Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.
>
> "The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Appellant was prejudiced by respondent not complying with this Rule since he was not made fully aware of all material facts as to which movant alleged that no genuine

issue existed.

The branch of the motion which sought a dismissal was predicated upon an alleged settlement. Since the Court did dismiss the action, one must assume that there was a finding that no genuine issue of fact existed as to whether plaintiff through his union representative had agreed to such a disposition of the wage claim. Yet the opposing affidavit by plaintiff denies a settlement and also shows further negotiations by Captain Shivers whereby he "did offer an additional 15 hours at $7.43 an hour in order to settle my claim" (Suissa, opposing affidavit, p. 3). This result of permitting a "hearsay" affidavit to assert unverified authority by certain union officials to settle a seaman's claim runs contrary to traditional admiralty solicitude shown by the Courts where a defense is raised that a seaman has contracted away his rights. See, Garrett v. Moore McCormack Co., 317 US 239, 87 L Ed 239.

POINT II

PLAINTIFF PROPERLY BROUGHT SUIT IN THE STATE COURT DESPITE PRIOR PROCEEDINGS UNDER THE COLLECTIVE BARGAINING AGREEMENT.

The Court below (Suissa, supra p. 1114) recognized that under United States Bull Carriers v. Arquelles, 400 US 351, 27 L Ed 2d 456, a seaman has a right to have judicial determination of a wage claim despite the existence of a collective bargaining agreement. The Supreme Court stated in Arquelles, p. 356:

> "We do not hold that §596 is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interests usually will be best served through §301 rather than through §596."

We submit that the Court in its opinion intended that the arbitration process be a necessary adjunct of the grievance procedure for merchant seamen (Arquelles, p. 352, 356). Furthermore, the concurring opinion by Mr. Justice Harlan deals at great length with the inadequacy of arbitration in an action brought pursuant to 45 USC 596 (statutory penalties).

By refusing to proceed further with the claim,

including arbitration, the union left plaintiff fully free to commence a lawsuit. Neither the actions of the company nor union could effectively deprive a seaman of his day in court (judicial or arbitral) under Arguelles..

POINT III

THE DISTRICT COURT SHOULD HAVE REMANDED THE CASE TO THE CIVIL COURT BECAUSE OF A LACK OF JURISDICTION.

Section 301 of the Labor Management Relations Act (the sole basis for claim of Federal jurisdiction on defendant's removal petition) has no present applicability since the plaintiff never claimed the benefits of the act or that it was part of his lawsuit. In the absence of such a claim by plaintiff, this maritime suit was non-removable from the State Court. See Vol. 1A, Moore's Federal Practice, pp. 942-943. The question of Federal jurisdiction is always before the Court; and as pointed out in Mitchell v. Maurer, 293 U.S. 237, 244; 79 L Ed 339, 343:

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court

> must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."

All of the claims and issues raised by the defendant in its motion for summary judgment should be litigated as defenses in the Civil Court where both plaintiff and defendant will have plenary opportunity to try these factual matters before a jury.

CONCLUSION

The judgment of dismissal should be reversed in its entirety and the action remanded to the Civil Court of the City of New York, County of New York.

Respectfully submitted,

Klein, Cohen & Schwartzenberg
Attorneys for Appellant

Max Cohen,
of Counsel

DOCKET ENTRIES

Form No. 106 Rev.

TITLE OF CASE

JACOB SUISSA

AGAINST

AMERICAN EXPORT LINES, INC. A/K/a
AMERICAN EXPORT ISBRANDSTEN LINES, INC.

For plaintiff:
KLEIN COHEN & SCHWARTZENBERG
15 Park Row,
N.Y.C. N.Y. 10038
227- 3787

For defendant:
Lorenz Finn Giardino & Lamb
21 West St NYC 10006
943-2470

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC	DISB.
J.S. 5 mailed X	Clerk		4/20/73			
			4/4/73			15
J.S. 6 mailed ✓	Marshal					
Basis of Action: SEAMEN'S SUIT. U.L. ACT. 1947	Docket fee					
	Witness fees					
Action arose at:	Depositions					

ONLY COPY AVAILABLE

Docket Entries

2a JUDGE WARD

'73 CIV. 1

DATE	PROCEEDINGS
12-20-73	Filed petition for Removal from Civil Court State & County of N.Y.
12.73	Filed Notice of Motion by Dft. Re: Dismiss Complaint. ret. 6/5/73.
12.73	Filed Notice of Removal by Dft.
12-20-73	Filed Undertaking on Removal in the sum of $500.00 Hartford Accident and Indemnity Company.
12.27.73	Filed Jury Demand by Pltff.
12.30.73	Filed Memorandum in support of dft. American Export Lines, Inc.'s motion to dismiss the complaint pursuant to rule 12(b)
1.73	Filed Pltffs. Memorandum of Law.
1.73	Filed Affidavit by Max Cohen in opposition dft. motion.
1.2.73	Filed Memorandum Decision. Defts. motion to dismiss is granted without prejudice to pltffs. filing an amended complaint stating a claim under 29 USC 185. Ward J. (mailed notice)
12.13.73	Filed Memo. End. on Dfts. motion dated 6/25/73. Motion granted in accordance with memorandum decision filed herewith. Ward J.
12-26-73	Filed JUDGMENT-Deft. have summary judgment against the pltff dismissing the complaint without prejudice to pltff's filing an amended complaint stating a claim under 29 U.S.C. 185--Clerk. Mailed notices 12-26-73.
1.11.74	Filed Pltffs. Notice of Appeal from final judgment filed 12/26/73. (mailed notice)
1.6.74	Filed Stip & order that the time to transmit the record to the USCA is extended to 4/11/74. Ward J.
2.18-74	Filed plaintiff's supplemental memo. of law.
4.9.74	Certified Record to the USCA.

MEMORANDUM DECISION
(Filed December 14, 1973)

U.S. DISTRICT COURT
FILED
DEC 14 1973
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOB SUISSA,

Plaintiff,

-against-

73 Civ. 1762
R.J.W.

AMERICAN EXPORT LINES, INC.,
(f/k/a AMERICAN EXPORT
ISBRANDTSEN LINES, INC.),

Defendant.

This is a seaman's action for overtime wages in the amount of $3,384.82 originally brought in New York Civil Court but claiming penalties for non-payment pursuant to 46 U.S.C. §596. Defendant removed the case to this Court, invoking jurisdiction under 29 U.S.C. §185 (commonly known as §301 of the Labor Management Relations Act), and moved to dismiss the complaint pursuant to Rule 12(b), Fed. R. Civ. P., for failure to state a claim upon which relief could be granted. Since the motion was supported and opposed with affidavits it is treated as one for summary judgment pursuant to Rule 56.

29 U.S.C. §185 has been held to authorize suits by an individual against an employer, pressing individual rights, so long as an allegation is made of breach by the union of its duty to fully and fairly represent the individual. Smith v.

Evening News Association, 371 U.S. 195 (1962); Vaca v. Sipes, 386 U.S. 171 (1967). Mere failure on the part of the union to follow the grievance procedure through arbitration is not such a breach of its duty of fair representation. Id. at 191. Were the court deciding this motion on the pleadings alone, it would not hesitate to dismiss the complaint with prejudice. However, plaintiff's affidavits contain allegations which, if more fully substantiated, might possibly support a contention of breach of the union's duty to represent him.

Plaintiff also argues that the claim for wages cannot be dismissed because it is before the court pursuant to 46 U.S.C. §596, which, under U.S. Bulk Carriers v. Arguelles, 400 U.S. 351 (1971), affords seamen an alternate remedy to the grievance procedure on a claim for wages. The court notes first that the claim stated in the complaint pursuant to this section is only the very limited claim for a penalty for failure, without sufficient cause, to pay wages due. Moreover, defendant argues, and persuasively, that plaintiff is bound by an election of remedies and having pursued the grievance procedure, cannot at this stage maintain an action under §596.

The United States Supreme Court, in Arguelles, supra, held that the fact that a seaman's terms of employment were governed by a collective bargaining agreement did not preclude

his pursuit of the statutory remedy under 46 U.S.C. §596 even though he had not submitted his claim to the grievance procedure established in the collective bargaining agreement. In so holding, the Court carved out a narrow exception to the principle of Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), that before an employee can resort to the courts to enforce individual rights under a collective bargaining agreement he must first exhaust the grievance procedure provided in that agreement. In its discussion, the Court noted the tension between 29 U.S.C. §185 and 46 U.S.C. §596, and observed that the Court "often must legislate interstitially to iron out inconsistencies within a statute or to fill gaps resulting from legislative oversight or to resolve ambiguities resulting from a legislative compromise." Arguelles, supra at 354. The Court considered the long tradition of federal courts' protection of the rights of seamen, in part expressed in 46 U.S.C. §596, as well as the evolving policy in favor of collective bargaining and arbitration under 29 U.S.C. §185. The Court indicated that the legislative history of the Labor Management Relations Act did not permit a conclusion that it was meant to supersede the ancient seaman's remedy in federal courts, and said,

"[S]ince the history of §301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them." Id. at 357.

In the case before this Court, the seaman chose the route under the collective bargaining agreement and 29 U.S.C. §185. Nothing in Arguelles can be read to indicate that, having so chosen, a seaman is exempt from the principles of Maddox, supra, or Vaca, supra. On the contrary, the Supreme Court expressed concern that policies favoring collective bargaining and non-judicial resolution of employment disputes continue to apply to seamen in maritime unions. Arguelles, supra at 357.

To permit a seaman who has chosen the route of the grievance procedure to satisfy a claim for wages, pursued it through several stages, and been dissatisfied with the results, then to sue in federal court on his separate statutory right under 46 U.S.C. §596, would undercut the principles of finality and conclusiveness enunciated in Maddox, supra, and Vaca, supra. Moreover, it would not further the purposes of §596. As Justice Harlan, concurring in Arguelles, stated

> "[T]he very essence of the legislative policy at stake here is ensuring promptness in the payment of wages. . . In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. §596 and §301 of the Labor Management Relations Act

> as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. §596." 400 U.S. at 366.

In view of these considerations, this Court holds that plaintiff's initial resort to the grievance procedure for resolution of his wage dispute precludes his now pressing a claim in this forum under 46 U.S.C. §596. Accordingly, defendant's motion to dismiss is granted without prejudice to plaintiff's filing an amended complaint stating a claim under 29 U.S.C. §185.

It is so ordered.

Dated: December 14, 1973

Robert J. Ward
U. S. D. J.

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS:SECOND CIRCUIT

SUISSA,

Plaintiff-Appellant,

against

AMER. EXPORT LINES,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 16th day of September 1974 at

deponent served the annexed Brief and Appendix upon

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 16th day of September 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975